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No. 84-2020

In the Supreme Court of the United States

OCTOBER TERM, 1984

PURSUE ENERGY CORPORATION, ALMEADIE BERRY, SHELBY JEAN BERRY AND CARL ERSKINE BERRY,
Petitioners,

vs.

CLARENCE WILBERT BERRY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SUPPLEMENTAL BRIEF OF PETITIONERS

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This petition presents the question of whether a state legislature, consistent with the federal constitutional guarantees prohibiting taking of property without just compensation, deprivation of property without due process of law, and impairment of contracts, may retroactively change the laws of descent and distribution to create, on behalf of illegitimates, a right of inheritance which did not exist at the time of the putative father's death.

In 1981, the Mississippi Legislature amended the statute governing illegitimacy inheritance rights to provide,

contrary to prior law, for an inheritance claim based upon an adjudication of paternity following the death of the putative father. Miss. Code Ann. § 91-1-15 (Supp. 1984). The instant action, as well as a host of other cases now pending in the Mississippi trial courts, was brought pursuant to the savings clause of the amended statute. This savings clause retroactively applied the new substantive law governing illegitimacy inheritance rights to the estate of *any* intestate who died prior to July 1, 1981, the effective date of the amended statute, and provided a three-year period in which to bring such retroactive claims pursuant to the statute.

Petitioners are the legitimate heirs and subsequent grantees of Shelby Berry, who died intestate in 1958. Throughout the litigation of this matter, Petitioners have vigorously maintained that retroactive application of this statute to divest property rights which became vested in the heirs at law of Shelby Berry more than twenty-five years ago would violate Petitioners' rights under the contracts clause and the fifth and fourteenth amendments to the United States Constitution. While the opinion of the Mississippi Supreme Court in this matter did not specifically address these constitutional issues, the Court recently issued, *en banc*, a Certificate of Federal Question stating that the Mississippi Supreme Court upheld the savings clause of Section 91-1-15 in this action against these federal constitutional challenges presented by Petitioners. See Appendix A at A1 for Certificate of Federal Question.

As is clearly shown by the Certificate of Federal Question, the Mississippi Supreme Court's decision in this matter is final on the federal issues presented. This judgment therefore meets the finality requirement of 28 U.S.C.

§ 1257(3) (1982), as that standard was fully articulated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In *Cox*, the Court noted that it has recurringly accepted jurisdiction in cases in which the highest state court had finally determined the federal issues present in an action, but in which further proceedings, including a complete trial on the merits, were to follow in the lower state courts. 420 U.S. at 477. The Court then identified four categories of such cases, with the fourth category described in the following manner:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . .

420 U.S. at 482-83.

Obviously, the position of Petitioners in the instant case falls within this category. If the revised illegitimacy inheritance statute cannot constitutionally be applied to create a claim of inheritance against the estate of a decedent who died prior to its enactment, then the long, complex and expensive litigation ahead in this case, as well as in the multitude of similar cases now pending in the Mississippi trial courts, will all be for naught. Moreover, even if Petitioners prevailed at the trial of this matter on nonfederal grounds, there would remain in effect the unreviewed decision of the Mississippi Supreme Court that

a state is free to retroactively change its laws governing descent and distribution, thereby divesting vested property rights of the heirs at law as determined by the law in effect at the time of the intestate's death. Such a decision casts a cloud of uncertainty, not only on the title to the property which is the subject matter of this litigation, but on the title to all property which has passed under a state's intestate succession laws. This result can be avoided only by immediate review of the Mississippi Supreme Court's decision by this Court.

As the Court said in *Cox Broadcasting Corp. v. Cohn*:

> Given these factors—that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

420 U.S. at 486. *See also Calder v. Jones*, 104 S. Ct. 1482, 1486 (1984); *Southland Corp. v. Keating*, 104 S. Ct. 852, 856-57 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 43-44 (1977).

Petitioners earnestly submit that the United States Constitution, if it is to afford any protection to the property rights of its citizens, must be immediately invoked, in this case, to invalidate this arbitrary, capricious and

retroactive act of divestiture attempted by the Mississippi Legislature.

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioners certifies that true and correct copies of the above and foregoing Supplemental Brief of Petitioners have been mailed by United States mail, postage prepaid, to the following:

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It is further certified that all parties required to be served have been served.

This the 11th day of September, 1985.

ALEX A. ALSTON, JR.

APPENDIX "A"

(Received and Filed July 31, 1985)

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,942

CLARENCE WILBERT BERRY

V.

ALMEADIE BERRY, SHELBY JEAN BERRY, CARL ERSKINE BERRY and PURSUE ENERGY CORPORATION

CERTIFICATE OF FEDERAL QUESTION

This Court, sitting en banc, certifies that in the arguments made before this Court on appeal and on petition for rehearing, appellees argued that the Savings Clause of Mississippi Code Annotated § 91-1-15 (Supp. 1984), if interpreted such as to allow appellant to maintain an inheritance claim, would violate the appellee's rights under Article 1, Section 10 of the United States Constitution, as well as the Fifth and Fourteenth Amendments; that, in its deliberations of the case, this Court held that *Larsen v. Kimble,* 447 So. 2d 1278 (Miss. 1984), disposes of the question before the Court, and this Court declined to address the federal constitutional questions; that, upon relying upon *Larsen v. Kimble, supra,* the holding of the Court was to the effect that the Savings Clause was not repugnant to these constitutional provisions; and that, in

effect, the federal constitutional questions were determined adversely to the position of the appellees.

SO CERTIFIED this 31st day of July, 1985.

/s/ Roy Noble Lee
Roy Noble Lee, Presiding Justice
Supreme Court of Mississippi